

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals  
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Washington, DC 20001-8002**

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DATE: May 22, 2000  
CASE NO.: 2000 - INA - 46

In the Matter of:  
BRILLIANT IDEAS, INCORPORATED,  
Employer,

on behalf of

ISAAC AMRAMI,  
Alien.

Appearance: Susan Schaier, Esq.  
New York, NY

Certifying Officer: Dolores DeHaan  
New York, NY

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Isaac Amrami ("Alien") filed by Employer Brilliant Ideas, Incorporated ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on December 2, 1999; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if grounds of appeal were not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

### **Statement of the Case**

On January 16, 1996, Employer filed an application for alien labor certification to allow it to fill the position of "Diamond Buyer" in its New York City, New York jewelry manufacturing business. The application was amended by Employer on April 11, 1997, and in final form described the position as follows:

"Negotiates and makes purchases of diamonds for use in jewelry manufacture, after examining, weighing, and grading diamonds according to quality, use, color, weight, and cut."

The job duty of "Supervises workers in sorting department" was dropped. Additionally, the wage was raised to meet the 5% requirement of the prevailing wage, to \$49,833.00 per year. A 9 to 5 schedule was called for, including work on Sundays, in accordance with the industry standard. A high school education was required, as was two years of experience in the offered position. Two years experience in the related occupation of Diamond Trading was dropped. No other special requirements were listed. (AF 4).

Employer advertised and posted the position in accordance with the applicable law. A total of eight applicants were referred as a result of the newspaper advertisement. Seven were referred on May 16, 1997, and one was referred on May 28, 1997. Employer reported the recruitment results by letter of July 11, 1997. Of the eight applicants, only four were interviewed. These four were rejected for reasons related to their knowledge and job qualifications. The other four referrals were not interviewed because they were unreachable by phone, did not respond to the letter sent by Employer on May 23, 1997 (AF 44), did not call to schedule an interview, or were unavailable because of vacation. (AF 48-50).

The File was transmitted to the CO on January 24, 1997, along with a summary of the advertising results. (AF 68-70).

A Notice of Findings ("NOF") which proposed to deny the application was issued on June 3, 1999. The CO cited the unlawful rejection of all eight referrals, who she deemed were qualified based upon their education, training and experience, in accordance with 20 C.F.R. § 656.24(b)(2)(ii). Specifically, based upon the submitted resumes, all eight applicants appeared qualified for the position, and the CO found that the reasons provided for rejecting four were not sufficiently explained. The CO requested greater detail in the explanations. Further, regarding the four who were not interviewed, the CO requested further proof and documentation of contacts and attempted contacts with the applicants. Copies of receipts for certified mail, with signed return receipts, and/or local telephone records were requested to show that the applicants were indeed contacted in a good faith manner. The CO noted that the letter to the applicants submitted with the recruitment results did not include a name, address, or phone number for the business. (AF 52-54).

Employer's Rebuttal was filed on June 18, 1999. This consisted of a one page cover letter from Employer's counsel, a two page letter of explanation from Employer, and copies of the letters sent to each applicant, with the company letterhead at the top of the page. All eight are dated May 23, 1997, and are unsigned. Employer offered further explanation of the reasons for rejecting the four interviewees, and maintained that the fact that half were interviewed, combined with Employer's assertions regarding attempted contacts with the other four, showed a good faith recruiting effort. No letters were sent by certified mail, as such was not required by the regulations, but Employer argued that because no letters had been returned as undeliverable, successful, if not productive, contact should be presumed. No telephone records were included in the Rebuttal. (AF 55-66).

The CO issued her Final Determination ("FD") denying certification on August 3, 1999. The CO found the Rebuttal credible as regards the four applicants who were interviewed for the position, and therefore found them rejected for lawful reasons. However, as regards the remaining four, the CO found a lack of good faith in recruitment based upon a failure to provide the requested documentation of attempts to contact each of the four. This included both certified mail receipts and the itemized phone bills. Further, the CO noted that the letters to applicants submitted in rebuttal differed from that submitted with the recruitment results. Consequently, it was unclear what contact had been attempted, and whether the attempts were timely. The CO therefore found that the Employer had unlawfully rejected qualified U.S. applicants. (AF 71-73).

On September 2, 1999, Employer submitted a request for administrative review. The grounds for review were that the totality of circumstances proved a good faith recruiting effort, even in the absence of the specific documentation requested by the CO. This was based upon the interviews given half the applicants, and the fact that the regulations do not specifically require use of certified mail to contact applicants. Employer also submitted itemized telephone bills, and a sworn statement explaining the discrepancies in the letters to applicants. (AF 76-83)

## Discussion

The Employer bears the burden of proving the elements necessary to establish entitlement to labor certification. 20 C.F.R. § 656.2(b). Further, the Employer must meet this burden through the evidence of record before the CO. The evidence submitted following the FD was not considered by the CO in making her decision. We therefore cannot consider it. 20 C.F.R. § 656.26(b)(4); 20 C.F.R. § 656.27(c). The telephone records and explanation of the discrepancies in the contact letters were not before the CO when she made her determination. We note as well that both these items could have been submitted with Rebuttal. The CO specifically requested the telephone records in the NOF, and the NOF also explicitly referred to the shortcomings of the submitted recruitment letter. This is not a situation in which the Employer was denied the opportunity to fully respond to the deficiencies because of a lack of notice. We therefore decline to remand the case for further consideration in light of the newly submitted evidence.

Employer admits that what is lacking here is documentation of its efforts to contact the apparently qualified U.S. workers who applied for the position. It is Employer's argument that documentation is not required in this case because half the applicants were interviewed, demonstrating circumstantially that all applicants were contacted. This argument is flawed.

In American Gas & Service Center, 1998-INA-79 (Jan. 1999), cited by Employer for the proposition that the overall pattern of attempts to contact should be considered in evaluating good faith, we stressed the reasonableness of the efforts to contact applicants, and specifically stated that a letter may not be sufficient. Phone calls may also be required. Employer's interpretation of the holding in American Gas is entirely correct. Employer must still adequately prove that reasonable attempts were made. All that is present in the record before us are bare assertions and circumstantial evidence. The CO was proper in her finding that this fails to meet Employer's burden. Bare assertions are not sufficient. Inter-World Immigration Service, 1988-INA-490 (Sept. 1, 1989), citing Tri-P's Corp., 1988-INA-686 (Feb. 17, 1989).

Employer is correct in saying that certified mail is not expressly required by the regulations, but the very case cited by Employer as authority, Flamingo Electroplating, Inc., 1990-INA-495 (Dec. 1991), also states that certified mail is "prudent," thereby avoiding a situation where an employer must rely on bare assertions, as here. Employer attempts to distinguish its situation because in Flamingo, an applicant expressly denied any contact, but we find this distinction in not germane. Employer bears the burden of proof, and should take whatever prudent steps are available to document its good faith and meet that burden.

Further, we note that Employer has submitted eight letters to applicants as copies of the letters actually sent to the applicants. These were submitted to address the concern of the CO that the letter submitted with the recruitment results did not inform applicants of how they were to contact Employer, or even where Employer was located. Specifically, the new letters are on letterhead, include the address of the applicant to whom they are directed, and bear a date. None of the eight are signed. This clarification of the mailing, combined with the fact that half of the

applicants were interviewed, is intended to supplement the bare assertions of contact made by the Employer. However, as Employer pointed out, in American Gas, *supra*, the burden on an employer is to show that the recruitment effort was reasonable. Here, because of the conflicts in the record and the failure to submit requested documentation in a timely fashion, we find that Employer has failed to meet that burden.

It is unclear exactly what form the letter to the applicants took. If the address of the Employer was not included within the correspondence, but was instead merely printed on the envelope, a conclusion reasonably drawn from the letter submitted with the recruitment report, it is not surprising that only half of the applicants contacted Employer. Not only would such a condition seem a highly questionable business practice, it is entirely likely that the envelopes were lost, discarded, or destroyed before the information could be gleaned from them. Even if such is not the case, relying solely upon a return address on the outside of an envelope surely would have a chilling effect upon the applicants, and is not a reasonable effort.

Moreover, this is a case where the Employer clearly had additional documentation to support its assertions: the itemized phone records submitted with the request for administrative review. While not proof of what exactly was said during the conversations, the records are less subject to questioning because they are not contradicted by other evidence in the file. Again, the Employer must take prudent steps to ensure that contact can be proven. This has not been done here.

We wish to stress that we do not find that Employer has practiced deception here, nor that it engaged in sharp practices in mailing any correspondence. We merely hold that an employer, in making reasonable recruitment efforts, must also document such. That burden is upon the employer. Here, Employer has raised a red flag by submitting conflicting evidence regarding its mailing, and by failing to produce specifically requested documentation in a timely fashion. In such situations, it is proper for any reviewing party, be it the Board or a CO, to question the pattern of behavior a bit more closely. A doubt which may not be reasonable under one set of circumstances is magnified and becomes eminently more reasonable under another, as in the case at bar.

In the absence of any proof of mailing, it is reasonable to conclude that these contact letters were produced specifically for the purposes of Rebuttal or were mailed in a form which did not constitute a reasonable effort.

We therefore find that the Employer has not met its burden of proof, and that the CO justifiably denied Employer's application for certification.

### **Order**

The Final Determination of the Certifying Officer is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.